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SPECIAL EDUCATION/CIVIL PROCEDURE—THE IDEA OF FAIRNESS: ALLOWING PARENT-ATTORNEYS TO RECOVER THEIR ATTORNEYS' FEES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Justin D. Kumpulanian

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SPECIAL EDUCATION/CIVIL PROCEDURE—THE IDEA OF FAIRNESS: ALLOWING PARENT-ATTORNEYS TO RECOVER THEIR ATTORNEYS' FEES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

INTRODUCTION

One of a parent's most important obligations is to educate her child. This obligation becomes significantly more difficult when the child is disabled. The Individuals with Disabilities Education Act (IDEA) was enacted to help parents of disabled children ensure the best possible education for their children.¹ Yet, the IDEA is a maze of administrative processes, and unfortunately most parents do not have the benefit of understanding the required procedures for working with the local school system. Although an experienced attorney could easily navigate the process for her client, unrepresented parents often cannot attain the best education available for their children. When the parent is also an attorney, the rare possibility exists that the parent-attorney may be able to adequately advocate for her child. However, even if a parent-attorney obtains a successful result in litigating the IDEA claim, it is unlikely that he will be compensated for the time and effort expended.²

The current version of the IDEA contains a fee-shifting provision, which reads: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability

1. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400-45 (2000)) [*hereinafter* Education for All Children Act]. This Act was the predecessor to the modern-day IDEA.

2. See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998); *Rappaport v. Vance*, 812 F. Supp. 609 (D. Md. 1993); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905 (Ind. 1996). Each of these cases denied parent-attorneys the right to recover their reasonable attorneys' fees under the IDEA's fee-shifting provision. The reasoning behind these decisions, which varies considerably, is discussed *infra*, Part II.A.

who is the prevailing party.”³ Several questions have arisen surrounding the interpretation of the fee-shifting provision.⁴

One of these issues, and the one that is the focus of this Note, occurs when a parent, who is also a member of the bar, represents her disabled child, yet is unable to recover attorneys’ fees under the IDEA’s fee-shifting provision.⁵ This Note concludes that parent-attorneys who represent their children in IDEA cases should be able to recover attorneys’ fees because the plain language, legislative history, and overall purpose of the IDEA support recovery, and that the past decisions denying awards were erroneous.

In Part I, this Note will examine the history of the IDEA, from the adoption of the Education for All Handicapped Children Act (EAHCA), to the Handicapped Children’s Protection Act (HCPA), and the modern-day IDEA.⁶ Part I will also examine the Supreme Court’s decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,⁷ and the administrative process of the modern-day IDEA.

Part II will discuss how courts have dealt with the fee-shifting provision for parent-attorneys when faced with the issue. Part III will discuss the rights given to parents under the IDEA, including the Supreme Court’s recent interpretation of those rights in *Winkelman v. Parma City School District*.⁸ Part III also examines whether

3. 20 U.S.C. § 1415(i)(3)(B).

4. There are many problems that have surfaced surrounding 20 U.S.C. § 1415(i)(3)(B). See Kathryn H. Crary, Comment, *Necessary Expertise: Allowing Parents to Recover Expert Witness Fees Under the Individuals with Disabilities Education Act*, 77 TEMP. L. REV. 967, 969 (2004) (discussing whether the language of the IDEA allows parents to recover the costs associated with their expert witnesses); Keith Greiner, Comment, *Judicial Imprimatur Required: Raising the Standard for Awards of Attorneys’ Fees under the IDEA in Smith v. Fitchburg Public Schools*, 41 NEW. ENG. L. REV. 711, 712-13 (2001) (arguing that the Court’s decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), will have a chilling effect on IDEA litigation).

5. See *Ford*, 461 F.3d at 1091; *S.N.*, 448 F.3d at 605; *Woodside*, 248 F.3d at 131; *Doe*, 165 F.3d at 264-65; *Rappaport*, 812 F. Supp. at 612; *Miller*, 665 N.E.2d at 906-07.

6. EAHCA was enacted first in 1975 in order to give handicapped children an education that would adequately prepare them for some form of post-graduation employment through the use of a free and appropriate public education (FAPE) and an Individual Education Plan (IEP). Education for All Children Act, *supra* note 1. The EAHCA was amended by the HCPA in 1986. See Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. §§ 1400-45). Those statutes were amended several times and are now codified at 20 U.S.C. §§ 1400-45. They now comprise the modern-day IDEA.

7. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598.

8. *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007).

parent-attorneys are proceeding pro se when representing their disabled children in an IDEA action, a theory some courts have relied on when denying attorneys' fees to parent-attorneys.⁹ Part III will then go on to analyze the plain language and legislative history of the IDEA's fee-shifting provision to determine how it should be interpreted.

Finally, this Note will conclude that because parent-attorneys are not proceeding pro se, awarding attorneys' fees in this context does not implicate the same concerns that surround the question of attorneys' fees in pro se representation. Moreover, the plain language of the IDEA's fee-shifting provision—as well as the legislative history and overall purpose of the statute—mandate that parent-attorneys who successfully represent their children recover their reasonable attorneys' fees.

I. AN OVERVIEW OF THE IDEA

A. *The EAHCA: The Foundation for the IDEA*

Throughout much of the history of the United States, disabled children were denied the opportunity to receive an education equal to that of nondisabled children.¹⁰ Until the mid-twentieth century, disabled children were often ostracized, considered feeble-minded, and “categorically excluded from public schools.”¹¹ Not until the 1960s did attitudes toward both the mentally and physically disabled transform.¹² In 1975, Congress recognized that millions of disabled children across the country were not receiving an education due to their exclusion from the public school systems,¹³ and it enacted the EAHCA.¹⁴ The EAHCA's stated purpose was to ensure that “all handicapped children have available to them . . . a

9. See, e.g., *Rappaport*, 812 F. Supp. at 612; *Miller*, 665 N.E.2d at 906-07.

10. Greiner, *supra* note 4, at 713-14.

11. *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 462 (1985) (Marshall, J., concurring)).

12. There is some suggestion that other contemporaneous social trends, namely the public recognition of disabled World War II veterans and the civil rights movement, contributed to this shift in attitude toward the disabled. *Id.* at 714. Greiner explains that due to the number of wounded soldiers who returned home from World War II, the country was forced to confront these disabilities both socially and medically. *Id.* Further, the civil rights movement advocated classroom integration of mentally and physically disabled children. *Id.* See generally RICHARD F. DAUGHERTY, SPECIAL EDUCATION: A SUMMARY OF LEGAL REQUIREMENTS, TERMS, AND TRENDS (2001).

13. 20 U.S.C. § 1400(c)(2)(B) (2000).

14. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-45).

free appropriate public education . . . designed to meet their unique needs"¹⁵ This cornerstone of the EAHCA would evolve and become engrained in the modern-day IDEA.¹⁶

As part of the EAHCA, parents were allowed to question the education provided to their disabled child by the school district and ultimately had the right to an impartial due process hearing to determine whether that education was indeed appropriate.¹⁷ However, because the original EAHCA had no fee-shifting provision built into it, parents who did not have financial resources were faced with tough choices regarding legal representation.¹⁸ As a result, parents seeking to recover their attorneys' fees had to do so by bringing an action pursuant to the Civil Rights Attorney's Fees Awards Act,¹⁹ or the Rehabilitation Act of 1973.²⁰ Some parents successfully recovered under this scheme²¹ until 1984 when the Supreme Court decided *Smith v. Robinson*.²²

B. *Smith v. Robinson and Congress's Response*

In 1984, the Supreme Court heard a case from Rhode Island concerning Congress's intent in enacting the EAHCA, specifically

15. *Id.* § 3 (codified as amended at 20 U.S.C. § 1400(d)(1)(A)).

16. S. REP. NO. 94-455, at 29 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1480, 1482.

17. 20 U.S.C. § 1415(e)(1); 1415(f)(1).

18. *See* Education for All Handicapped Children Act of 1975.

19. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2000)).

20. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (2000)); *see also* Crary, *supra* note 4, at 973 n.57 (noting that the intention of Congress in enacting the Civil Rights Attorney's Fees Awards Act was to give courts the ability to assist plaintiffs whose constitutional and statutory rights had been violated). This Comment has an excellent discussion of the situation and how parents dealt with it:

Section 504 of the Rehabilitation Act of 1973 prevents discrimination on the basis of handicap in a variety of programs and activities receiving federal financial assistance, and section 505(b) of this Act provides attorneys' fees for successful plaintiffs in these claims. Prior to the Supreme Court's decision in *Robinson*, parents had frequently brought claims under both the EAHCA and either section 1988 or section 504 of the Rehabilitation Act, ostensibly to obtain an award of attorney's fees.

Id. (citations omitted). The real problem was that in order to recover their fees, parents had to bring suit under multiple statutes, which raised the cost and complexity of litigation. *Id.*

21. *See, e.g.,* Tatro v. Texas, 703 F.2d 823, 823 (5th Cir. 1983) (affirming decision of district court awarding parents their attorney's fees based on a Rehabilitation Act of 1973 claim), *overruled by* *Smith v. Robinson*, 468 U.S. 992 (1984).

22. *Smith v. Robinson*, 468 U.S. 992 (1984), *superseded by statute*, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. §§ 1440-45).

whether the proper method for obtaining attorneys' fees was via the Civil Rights Attorney's Fees Awards Act or under section 505 of the Rehabilitation Act of 1973.²³ *Smith* arose out of an action to determine whether an eight-year old child afflicted with cerebral palsy could demand that the local school district, or the state Division of Mental Health, Retardation, and Hospitals, pay for her education at a private school.²⁴ The child's parents prevailed in their action in the lower court and brought a request for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act.²⁵ The U.S. District Court for the District of Rhode Island awarded attorney's fees to the parents for a variety of reasons,²⁶ but the Court of Appeals for the First Circuit reversed.²⁷ The parents appealed, and the Supreme Court affirmed the First Circuit.²⁸ The Court rea-

23. *Smith*, 468 U.S. at 994-95.

24. *Id.* at 995.

25. *Id.* at 1000.

26. *Id.* at 1001. In *Smith*, the Court summarized the reasoning of the District Court:

[T]he court reasoned that because petitioners were required to exhaust their EHA [Education of the Handicapped Act] remedies before bringing their § 1983 and § 504 claims, they were entitled to fees for those procedures. . . . [T]he court rejected the defendants' argument that fees should not be allowed because this was an action under the EHA, which does not provide for fees. In the court's view, respondents had given insufficient weight to the fact that petitioners had alleged equal protection and § 1983 claims as well as the EHA claim. The court added that it found the equal protection claim petitioners included in their second amended complaint to be colorable and nonfrivolous. Petitioners thus were entitled to fees for prevailing in an action to enforce their § 1983 claim.

Id. at 1001-02.

27. *Id.* at 1002. The *Smith* court described the First Circuit's reason for denying fees, stating:

The court first noted that, under what is labeled the "American Rule," attorneys' fees are available as a general matter only when statutory authority so provides. Here the action and relief granted in this case fell within the reach of the EHA, a federal statute that establishes a comprehensive federal-state scheme for the provision of special education to handicapped children, but that does not provide for attorneys' fees. For fees, the District Court had to look to § 1988 and § 505 of the Rehabilitation Act.

As to the § 1988 claim, the court acknowledged the general rule that when the claim upon which a plaintiff actually prevails is accompanied by a "substantial," though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate. Here, petitioners' § 1983 claims arguably were at least substantial enough to support federal jurisdiction. Even if the § 1983 claims were substantial, however, the Court of Appeals concluded that, given the comprehensiveness of the EHA, Congress could not have intended its omission of attorneys' fees relief to be rectified by recourse to § 1988.

Id. at 1002-03 (citations omitted) (footnotes omitted).

28. *Id.* at 1021.

soned that allowing parents to circumvent the administrative process of the Education of the Handicapped Act (EHA) would be contrary to Congress's objectives in enacting the statute.²⁹ The Court further stated that since Congress had provided that the EHA be the exclusive avenue for disabled children challenging their education, parents could not recover attorneys' fees based on the EHA or other civil rights statutes.³⁰

Congress's response to the Court's decision in *Smith* was both swift and hostile. It enacted HCPA in 1986,³¹ including the following provision: "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party."³² With this language, parents could now obtain fee awards if they were prevailing party.³³

C. *The 1997 Reauthorization of the IDEA to the Present Day*

In 1997, Congress reauthorized the IDEA,³⁴ expanding the Act to increase the accountability of local schools, broaden the legal protections and remedies available to disabled children, and increase the parents' rights with regard to the educational decision-making process.³⁵

Congress also limited eligibility for awards of attorneys' fees.³⁶ The first limitation made fee recovery unavailable for "attorney

29. *Id.* at 1012-13; *see also* Education of the Handicapped Act of 1970, Pub. L. No. 91-230, 84 Stat. 121 (codified as amended at 20 U.S.C. § 1400).

30. *Smith*, 468 U.S. at 1012.

31. Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(i)(3)(B) (2000)); *see also* S. REP. NO. 99-112, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799 ("Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents.").

32. Handicapped Children's Protection Act § 2(B).

33. However, problems would surface in attempting to define who is a prevailing party. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) (muddying the waters in attempting to define who is a "prevailing party" for the purpose of recovering attorneys' fees).

34. Congress officially began calling the IDEA by that name when it amended the EAHCA in 1991. *See* Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, § 1, 105 Stat. 587, 587 (codified at 20 U.S.C. § 1400). For the purposes of this Note, the essential provisions of the IDEA have not changed.

35. Jessica Butler-Arkow, *The Individuals with Disabilities Education Improvement Act of 2004: Shifting School Districts' Attorneys' Fees to Parents of Children with Disabilities and Counsel*, 42 WILLAMETTE L. REV. 527, 529 (2006); *see also* Judith E. Heumann & Tom Hehir, *Believing in Children—A Great IDEA for the Future*, EXCEPTONAL PARENT, Sept. 1997, <http://www.ed.gov/offices/OSERS/Policy/IDEA/article2.html> (last visited Mar. 15, 2009).

36. *See* 20 U.S.C. § 1415(i)(3)(D)-(F).

presence at team meetings to develop a student's Individual Education Plan (IEP)" and "mediations prior to a due process complaint being filed."³⁷ The second limitation made fees unavailable when the parent "[did] not provide[] the school district with the information required in the due process complaint."³⁸ These amendments, when combined with the 2004 reauthorization, comprise the modern-day exceptions to obtaining a fee award under the IDEA.³⁹

Further, § 1415(i)(3)(E) provides an exception to the limitations on attorneys' fees, stating: "Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer."⁴⁰ While altering the language of the IDEA's fee-shifting provision clarified Congress's intent to create a mechanism for parents to recover attorneys' fees,

37. Lynn M. Daggett, *Special Education Attorney's Fees: of Buckhannon, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. JUV. L. & POL'Y 1, 9 (2004).

38. *Id.* The original text of the bill contained another proposed limitation requiring courts "to take into consideration what impact that award will have on all of the students in the district or in the particular classrooms," which was defeated in the Senate. *Id.*

39. 20 U.S.C.A. § 1415(i)(3)(D) (Supp. 2008). The statute reads:

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section.

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) of this section shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

Id.

40. 20 U.S.C. § 1415(i)(3)(E).

these amendments did not end the controversy surrounding fee shifting under the IDEA.

In 2001, the Supreme Court issued its decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*.⁴¹ In *Buckhannon*, the Court interpreted the fee-shifting provisions of the Americans with Disabilities Act⁴² and the Fair Housing Amendments Act,⁴³ statutes that have fee-shifting provisions closely akin to those in the Civil Rights Act⁴⁴ and the IDEA.⁴⁵ In *Buckhannon*, the Court held that to be deemed a "prevailing party" under the fee-shifting provision, the party attempting to obtain a fee award must have acquired a "judicially sanctioned change in the legal relationship of the parties."⁴⁶ Thus, in order to qualify for a fee award, the parents had to obtain some form of court-ordered relief, either by judgment or court-approved consent decree.⁴⁷ In its holding, the Court overturned the long-accepted catalyst theory of obtaining prevailing party status.⁴⁸ The Court took a textual approach in interpreting the IDEA,⁴⁹ reasoning that the common legal definition of "prevail" was plain on

41. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

42. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 505, 104 Stat. 327, 371 (codified at 42 U.S.C. § 12205 (2000)).

43. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 812, 102 Stat. 1619, 1633 (codified at 42 U.S.C. § 36012).

44. 42 U.S.C. § 1988(b).

45. See 20 U.S.C. § 1415(i)(3)(8); see also Daggett, *supra* note 37, at 35 n.186. Since the *Buckhannon* decision, three federal courts of appeal have found that the decision applies to IDEA claims. See *T.D. v. Lagrange Sch. Dist.*, 349 F.3d 469 (7th Cir. 2003); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003); *J.C. v. Reg'l Sch. Dist.*, 278 F.3d 119, 124-25 (2d Cir. 2002).

46. *Buckhannon*, 532 U.S. at 605.

47. Daggett, *supra* note 37, at 29.

48. *Buckhannon*, 532 U.S. at 602. The catalyst theory "posited that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. The Court also recognized that a host of federal appellate courts (all but the Courts of Appeals for the Fourth and Fifth Circuits) had upheld the catalyst theory. *Id.* at 602; see *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574 (1st Cir. 1999); *Morris v. W. Palm Beach*, 194 F.3d 1203 (11th Cir. 1999); *Payne v. Bd. of Educ.*, 88 F.3d 392 (6th Cir. 1996); *Marbley v. Bane*, 57 F.3d 224 (2nd Cir. 1995); *Kilgour v. Pasadena*, 53 F.3d 1007 (9th Cir. 1995); *Zinn v. Shalala*, 35 F.3d 273 (7th Cir. 1994); *Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541 (3d Cir. 1994); *Little Rock Sch. Dist. v. Pulaski City Special Sch. Dist.*, 17 F.3d 260 (8th Cir. 1994).

49. Daggett, *supra* note 37, at 30. The textual approach argues that judges should go no further than the specific language of the statute when making decisions concerning the statute. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 25-26 (2006).

its face.⁵⁰ The Court appeared not to consider the policy implications that would follow from its decision.

Most courts have agreed that the *Buckhannon* decision should apply to the IDEA.⁵¹ However, *Buckhannon* has drawn scholarly criticism from many places.⁵² The consequences of applying *Buckhannon* to the IDEA were pointed out by Justice Ginsburg in her dissent, where she claimed that the Court's limited definition of "prevailing party" would provide private attorneys less incentive to prosecute IDEA cases in the future.⁵³ While *Buckhannon* provides a significant barrier for some parents wishing to recover their attorneys' fees, the complexity of the IDEA's administrative process evidences the necessity of parents being able to obtain and afford experienced counsel in order to further the IDEA's objectives.

D. *The Administrative Process of an IDEA Claim*

This section of Part I will examine exactly how IDEA claims are adjudicated. Under the IDEA, states that receive federal fund-

50. *Black's Law Dictionary* defines "prevail" for this purpose as: "To obtain the relief sought in an action; to win a lawsuit." BLACK'S LAW DICTIONARY 1226 (8th ed. 2004).

51. Daggett, *supra* note 37, at 35; *see also* Doe v. Boston Pub. Sch., 264 F. Supp. 2d 65, 69-73 (D. Mass. 2003); Matthew V. v. DeKalb County Sch. Sys., 244 F. Supp. 2d 1331, 1340-44 (N.D. Ga. 2003); Alegria v. District of Columbia, No. 02-7126, 2002 WL 31818925 (D.C. Cir. Dec. 13, 2002); Luis R. v. Joliet Twp. High Sch. Dist. 204, No. 01-C-4798, 2002 WL 54544, at *2 (N.D. Ill. Jan. 15, 2002); *supra* note 46 for federal courts of appeal that have held that *Buckhannon* applies to the IDEA's fee-shifting provision.

52. *See* Paolo G. Annino, *The Buckhannon Decision: The End of the Catalyst Theory and a Setback to Civil Rights*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13 (2002) (arguing that *Buckhannon* "discourages the enforcement of Civil Rights"); Daggett, *supra* note 37, at 52-53 (arguing that the future of the IDEA's fee-shifting provision is unclear due to *Buckhannon*); Michael Giuseppe Congiu, Comment, *An End to Empty Distinctions: Fee Shifting, the Individuals with Disabilities Education Act, and Doe v. Boston Public Schools*, 80 CHI.-KENT L. REV. 963, 979 (2005) (arguing that *Doe v. Boston Public Schools*, a decision which relied on *Buckhannon*, should be overturned); Greiner, *supra* note 4, at 755-56 (arguing that attorneys' fee awards are necessary for the proper function of the IDEA and urging congressional action to clear up the "prevailing party" controversy); Robert H. Greenwood, *Attorney Fees in Special Education Cases*, N.J. LAW., June 2003, at 56, 59-60 (noting the comments of New Jersey special education lawyer Ruth Lowenkron, which suggest that *Buckhannon* has disadvantaged the poor by raising the bar too high to recover fees under the IDEA). *But see id.* at 60 (relating the comments of New Jersey lawyer and long-time child advocate Ira Fingles, which suggest that *Buckhannon* has had no significant impact).

53. *Buckhannon*, 532 U.S. at 622-23 (Ginsburg, J., dissenting). Although *Buckhannon* is not the specific issue of this Note, understanding its context is essential because it has been used to bar awards to parent-attorneys even where such awards should have been allowed under the language of the statute. *See* Matthew V. v. Dekalb County Sch. Sys., 244 F. Supp. 2d 1331 (N.D. Ga. 2003).

ing must provide the federal government with an annual plan to offer special education and to meet, generally, the statute's free appropriate public education (FAPE) standard.⁵⁴ In addition to providing a FAPE, schools must involve the parents of the disabled child in the determination of what the educational process should be⁵⁵ and notify the parents of their procedural rights under the statute.⁵⁶ The normal process of administering the IDEA, assuming that there are not any quarrels between the parents and the school, involves ten steps:

- 1) a child is identified as possibly needing special education and related services; 2) the child is evaluated; 3) eligibility is decided; 4) the child is found eligible for services; 5) an Individualized Education Program (IEP) meeting is scheduled; 6) an IEP meeting is held, and the IEP is written; 7) services are provided; 8) progress is measured and reported to parents; 9) the IEP is reviewed by the IEP team a minimum of once a year; and 10) the child is reevaluated at least every three years.⁵⁷

Whether a child is eligible under the IDEA requires an evaluation, which can be ordered by a hearing officer, obtained with parental consent, or requested by a parent.⁵⁸ Once a child has been deemed eligible under the statute, the school works with the child's parents to create an IEP, which describes the educational services to be provided to the child throughout the school year.⁵⁹ If at any point a parent disputes the IEP, the results of an evaluation, or the way that the IEP is being administered, the parent can request an impartial due process hearing.⁶⁰

At the due process hearing, the parents have the right to represent their child themselves, to have an attorney present, or to

54. M. Brendhan Flynn, Note, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 IND. L.J. 881, 884 (2005); see also 20 U.S.C. § 1412(a)(1) (2000).

55. Flynn, *supra* note 54, at 885.

56. See 20 U.S.C. § 1415(b)(3) (requiring written notice to the parents); *id.* § 1415(c) (detailing what the notice must include).

57. Tana Lin, Commentary, *Recovering Attorney's Fees Under the Individuals with Disabilities Education Act*, 180 EDUC. L. REP. 1, 3 (2003) (citing OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM (2000), available at <http://www.ed.gov/parents/needs/spced/iepguide/iepguide.pdf>).

58. See 20 U.S.C. § 1414(a)-(c); Flynn, *supra* note 54, at 885.

59. 20 U.S.C. § 1414(d)(1)(A); Flynn, *supra* note 54, at 885.

60. *Id.* § 1415(f).

use a non-attorney representative to represent their child.⁶¹ In order to prevail at a due process hearing, the parents must prove one of two things: either that the school failed to meet the IDEA's standard for an IEP, or that the school did not follow the statute's procedural safeguards.⁶² If the parents are not satisfied with the results of the due process hearing, they may appeal to the state educational board's appellate review panel.⁶³ If the results are still not satisfactory and all avenues of the administrative hearing process have been exhausted, then either party, the school district or the parents, can appeal to a state or federal district court.⁶⁴

The final stage of the process is the court's review of the administrative hearings. Courts will usually review due process hearings under a limited standard and scope, giving due weight to the outcome of the administrative proceedings.⁶⁵ This deference recognizes that local hearing officers are usually experts in their respective fields, and that administration of education is traditionally a state function.⁶⁶

II. THE IDEA'S FEE-SHIFTING PROVISION AS IT PERTAINS TO PARENT-ATTORNEYS

A. *The Role of Kay v. Ehrler*

The first step in understanding the decisions involving the IDEA's fee-shifting provision as it applies to parent-attorneys is to examine the Supreme Court's decision in *Kay v. Ehrler*.⁶⁷ Though not an IDEA case, *Kay* is of paramount importance to the legal reasoning of the cases that have been decided regarding the IDEA

61. *Id.* § 1415(h)(1). The due process hearing is usually conducted by a state official. *Id.* § 1415(f)(1).

62. Flynn, *supra* note 54, at 885. Under this standard the IEP must provide a FAPE. See 20 U.S.C. § 1402(a)(1). The statute also requires that disabled children be given an education that will offer them meaningful opportunities for post-graduation employment. *Id.* § 1400(d)(1)(A).

63. 20 U.S.C. § 1415(g).

64. *Id.* § 1415(i)(2)(A).

65. See Flynn, *supra* note 54, at 886; see also *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052-53 (7th Cir. 1997) (holding that a court should give weight to the results of the administrative proceedings); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 790 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) (stating that courts must use the administrative record unless there is new evidence to supplement the record). But see *Metro. Gov't of Nashville v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990) (allowing any new evidence to be presented to the court).

66. Flynn, *supra* note 54, at 886-87 (citing *Heather S.*, 125 F.3d at 1052-53).

67. *Kay v. Ehrler*, 499 U.S. 432 (1991).

fee-shifting provision.⁶⁸ In *Kay*, a civil rights action, the Court held that a pro se litigant, who was also a lawyer, could not be awarded his attorney's fees under the fee-shifting provision of the Civil Rights Act.⁶⁹ The fee-shifting language of § 1988 stated, "In any action or proceeding . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"⁷⁰ The Court decided that the language of the statute was not clear.⁷¹ It thus turned to the House and Senate Reports for clarification of the underlying statutory purpose.⁷² The Court concluded that the legislature had focused on the need for lawyers to be affordable to the general public,⁷³ and the primary statutory concern was to enable civil rights litigants to obtain independent counsel.⁷⁴ Finally, the Court held that a rule that would award fees to attorneys who represent themselves pro se in § 1988 claims would undermine the stated purpose of the statute by discouraging litigants from obtaining independent counsel:

A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.⁷⁵

68. See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998); *Matthew V. v. Dekalb County Sch. Sys.*, 244 F. Supp. 2d 1331 (N.D. Ga. 2003); *Rappaport v. Vance*, 812 F. Supp. 609 (D. Md. 1993); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905 (Ind. 1996).

69. *Kay*, 499 U.S. at 438.

70. Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988(b) (2000).

71. *Kay*, 499 U.S. at 435. The Court explained the statute's lack of clarity: On the one hand, petitioner is an "attorney," and has obviously handled his professional responsibilities in this case in a competent manner. On the other hand, the word "attorney" assumes an agency relationship and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988. Although this section was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.

Id. at 435-36 (citations omitted).

72. *Id.* at 436 n.8.

73. *Id.*

74. *Id.* at 437.

75. *Id.* at 438.

Later courts would turn to this Supreme Court statement for guidance in attempting to resolve issues with the IDEA's fee-shifting provision.⁷⁶

B. The Early Decisions Involving the IDEA's Fee-Shifting Provision

The first court to tackle the IDEA fee-shifting provision as it pertains to parent-attorneys was the U.S. District Court for the District of Maryland in *Rappaport v. Vance*.⁷⁷ In *Rappaport*, an attorney-father brought a claim on behalf of his disabled minor child, contesting certain elements of his child's IEP.⁷⁸ The father, having obtained a favorable judgment in the IDEA claim, claimed to be a prevailing party entitled to his reasonable attorney's fees under the IDEA's fee-shifting provision.⁷⁹

The court began by stating that both the legislative history of the IDEA, as well as existing case law interpreting the IDEA's fee-shifting provision, indicate that it should be interpreted consistently with Title VII's fee-shifting provision.⁸⁰ The court then examined the legal relationship between Mr. Rappaport and his disabled child to determine whether he was proceeding pro se. It observed that: "Because the language of the statute identifies the parent with the child, and because of the close, natural relationship between parent and child, a parent's representation of a disabled child is effectively pro se representation."⁸¹ The court then concluded that because Mr. Rappaport was acting pro se, and because the IDEA's fee-shifting provision should be interpreted in accord with Title VII's provision, the logic of *Kay* applied, and the petition for attorney's fees was denied.⁸²

76. See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1091 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 604 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260, 263 (4th Cir. 1998); *Rappaport v. Vance*, 812 F. Supp. 609, 611-12 (D. Md. 1993); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905, 906-07 (Ind. 1996).

77. *Rappaport*, 812 F. Supp. 609.

78. *Id.* at 610.

79. *Id.* at 610-11.

80. *Id.* at 611. The court cited a Senate report and the decision in *Abu-Sahyun v. Palo Alto Unified School District* as justification for interpreting the IDEA's fee-shifting provision in accord with that of Title VII. *Abu-Sahyun v. Palo Alto Unified Sch. Dist.*, 843 F.2d 1250, 1252 (9th Cir. 1988); S. REP. NO. 99-112, at 14 (1985), reprinted in 1986 U.S.C.C.A.N. 1978, 1804.

81. *Rappaport*, 812 F. Supp. at 612.

82. *Id.* at 611-12. The court expounded on its application of *Kay*'s reasoning:

The next court to examine this issue was the Supreme Court of Indiana in *Miller v. West Lafayette Community School Corp.*⁸³ As in *Rappaport*, the parents were challenging their disabled child's IEP on the grounds that it did not meet his educational needs.⁸⁴ The father, an attorney, brought the claim on behalf of his son.⁸⁵ *Miller* did not analyze the question of whether Mr. Miller was acting pro se, but merely agreed with the trial court that he was.⁸⁶ The *Miller* court then pointed out the similarities between the fee-shifting provisions of the IDEA and 42 U.S.C. § 1988.⁸⁷ The court applied the reasoning of *Kay*, agreeing with the result reached in *Rappaport*, and denied the plaintiffs' petition for a fee award.⁸⁸

C. *The Federal Appellate Courts Deny Fee Awards*

In 1998, the Court of Appeals for the Fourth Circuit decided *Doe v. Board of Education*.⁸⁹ This was the first time that a federal appellate court heard the issue whether parent-attorneys could recover their fees.⁹⁰ The Does challenged the school district's treatment of their disabled son and were represented by Mr. Doe, an attorney, who brought the claim on behalf of his child.⁹¹ Namely, they asserted that the school district was not providing an appropriate behavior modification program.⁹² The Does prevailed at an appellate hearing before the Maryland Office of Administrative Hearings and ultimately petitioned the district court for their attor-

It should also be noted that attorneys' fee awards in general provide litigants with access to legal expertise they would not normally have. Since Nolan Rappaport is a lawyer, such a provision is not as critical. Thus, for the same reasons that pro se litigants' attorneys' fees are denied in Title VII cases, such fees should be denied in IDEA disputes.

Id. at 611. When the court says "for the same reasons" it is referring to the logic of *Kay*. The statement above echoes the *Kay* decision. See *Kay v. Ehrler*, 499 U.S. 432 (1991).

83. *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905 (Ind. 1996).

84. *Id.* at 905-06.

85. *Id.*

86. *Id.*

87. *Id.* at 906.

88. *Id.* at 906-07. The court noted the similarity between *Miller* and *Rappaport* and stated, "[w]hile the rulings of a United States District Court are not binding upon this Court, we agree with the reasoning in *Rappaport* and reach a similar result in the present case." *Id.*

89. *Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998).

90. *Id.* at 262 ("No circuit, however, has dealt with a *Kay*-based challenge to fees for services of an attorney in successfully representing his or her own child in an IDEA claim.").

91. *Id.* at 261.

92. *Id.*

ney's fees under what was then the fee-shifting provision: 20 U.S.C. § 1415(e)(4)(B).⁹³ The Does argued that the plain language of the statute provided for a fee award, but the Fourth Circuit ruled against them.⁹⁴

The *Doe* court disagreed with the *Rappaport* and *Miller* courts that parent-attorneys who represent their children are acting pro se.⁹⁵ However, the *Doe* court still found *Kay* to be applicable.⁹⁶ The court concluded that Mr. Doe had "obtained an excellent result"⁹⁷ in representing his child and that parent-attorneys were not acting pro se. Yet, the court denied an attorney fee to the Does, basing its reasoning on the "special circumstances doctrine."⁹⁸ The *Doe* court stated that the special circumstances doctrine was applicable in a situation where, "although a prevailing party should ordinarily recover an attorney's fee, special circumstances can render

93. *Id.* In 1997, prior to the Court hearing the Does' claim, the IDEA reauthorization amended the fee-shifting language, which altered the codification from 20 U.S.C. § 1415(e)(4)(B) to 20 U.S.C. § 1415(i)(3)(B)-(F). See *supra* note 37 and accompanying text.

94. *Doe*, 165 F.3d at 265.

95. *Id.* at 262-63. The court reasoned that, in an IDEA claim, the real party in interest is the child:

The adequacy of such a plan is determined by how appropriately it meets the needs of the child, not the parents. Even the wording of the IDEA fee-shifting provision supports the notion that the child is the focus of the IDEA, by providing fees "to the parents of a *child or youth with a disability who is the prevailing party.*"

Though parents have some rights under the IDEA, the child, not the parents, is the real party in interest in any IDEA proceeding. The references to parents are best understood as accommodations to the fact of the child's incapacity. That incapacity does not collapse the identity of the child into that of his parents.

Id. (citations omitted).

96. *Id.* at 263. The court stated that although *Kay* was not directly on point, it had clear relevance in this situation:

After all, the central thrust of *Kay* is that fee-shifting statutes are meant to encourage the effective prosecution of meritorious claims, and that they seek to achieve this purpose by encouraging parties to obtain independent representation. Like attorneys appearing pro se, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that "reason, rather than emotion" will dictate the conduct of the litigation.

Id. (citing *Kay v. Ehrler*, 499 U.S. 432, 437 (1991)).

97. *Id.*

98. *Id.* at 264. The special circumstances doctrine was announced in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and affirmed in *Hensley v. Eckhardt*, 461 U.S. 424, 429 (1983), two cases dealing with the fee-shifting provisions of civil rights statutes. The special circumstances doctrine is applied when a party is a prevailing party for purposes of a statutory fee recovery, but special circumstances warrant a denial of the award. See *Hensley*, 461 U.S. at 429.

such an award unjust.”⁹⁹ The court held that the special circumstance here was the fact that the disabled child was represented by his parent and not an independent attorney and denied the Does their attorney’s fees.¹⁰⁰

In 2001, the Court of Appeals for the Third Circuit examined the same issue that was addressed in *Doe* in *Woodside v. School District of Philadelphia Board of Education*.¹⁰¹ Mr. Woodside, a licensed attorney, brought an administrative challenge on behalf of his child against the school board on the grounds that his disabled son’s physical and occupational therapy sessions did not meet his needs.¹⁰² After prevailing at an administrative hearing, the Woodsides petitioned the district court for their attorney’s fees under the IDEA’s fee-shifting statute.¹⁰³ The petition was denied, and the Woodsides appealed.¹⁰⁴

The *Woodside* court took note of the Fourth Circuit’s decision in *Doe*.¹⁰⁵ After acknowledging and summarizing *Doe*, the court denied an award stating that it joined “the Fourth Circuit in holding that an attorney-parent cannot receive attorney fees for work representing his minor child in proceedings under the IDEA.”¹⁰⁶ The court offered no additional rationale for its decision.¹⁰⁷

The Court of Appeals for the Second Circuit heard *S.N. v. Pittsford Central School District* in 2006.¹⁰⁸ *S.N.* dealt with an IDEA claim based upon a challenge that the disabled student’s IEP was not meeting her needs.¹⁰⁹ After prevailing at an administrative appeal, *S.N.*, represented by her father, petitioned the district court for attorney’s fees, and appealed when that petition was denied.¹¹⁰ The Second Circuit, noting the holdings of *Woodside* and *Doe*, denied the fee award based upon *Kay*.¹¹¹

99. *Doe*, 165 F.3d at 264 (internal quotation marks omitted) (quoting *Hensley*, 461 U.S. at 429).

100. *Id.* at 264-65.

101. *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001).

102. *Id.* at 130.

103. *Id.*

104. *Id.*

105. *Id.* at 130-31.

106. *Id.* at 131.

107. *Id.* at 129-31.

108. *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006).

109. *Id.* at 602.

110. *Id.*

111. *Id.* at 603-05. Interestingly, the court never stated specifically whether parent-attorneys were in fact acting pro se. Nevertheless, it commented that “[w]e acknowledge that *S.N.*’s request [for fees] does not fall directly within the Supreme

The most recent federal appellate court to examine the issue and deny a fee award was the Court of Appeals for the Ninth Circuit in *Ford v. Long Beach Unified School District*.¹¹² *Ford* arose out of yet another challenge to a disabled student's IEP; the child was represented by her mother.¹¹³ After a settlement was reached between the parties, Ford moved for attorney's fees.¹¹⁴

Again, in denying fees, the court ultimately relied upon the previous holdings of appellate courts and *Kay*.¹¹⁵ The court noted that under the plain language of the statute, "the Fords appear to be entitled to fees."¹¹⁶ Yet, despite the apparent plain meaning, the court looked to familiar sources for assistance in interpreting the statute's language—§ 1988 and the *Kay* decision.¹¹⁷ The *Ford* court agreed with *Woodside* and found that parent-attorneys are not acting pro se:

Like an attorney appearing *pro se*, a disabled child represented by his or her parent does not benefit from the judgment of an independent third party. Indeed, "the danger of inadequate representation is as great when an emotionally charged parent represents his minor child as when the parent represents himself."¹¹⁸

Although the court recognized that some parent-attorneys may be able to provide rational, competent representation for their children, the court was "convinced" that a bright-line rule that parent-attorneys are unable to do so was more faithful to the legislative

Court's holding in *Kay*, but nonetheless agree with the Third and Fourth Circuits that *Kay* is clearly relevant." *Id.* at 604. The court was not persuaded by the attorney-father's arguments distinguishing *Kay*. He asserted (1) that parent-attorneys were not acting pro se and thus *Kay* did not apply; (2) there are differences between the statute analyzed in *Kay*, the Civil Rights Attorney's Fees Award Act, and the IDEA; and (3) that if fees were denied, it could create arbitrary distinctions between IDEA fee claims filed by parent-attorneys and more distant relative-attorneys. *Id.* at 604-05.

112. *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006).

113. *Id.* at 1088. The administrative history of the case is more complex than stated. For those interested in a messy IDEA situation, this unusual chain of events and disputes are summed up nicely by the court. *See id.* at 1088-89.

114. *Id.*

115. *Id.* at 1090.

116. *Id.*

117. *Id.*

118. *Id.* at 1091 (quoting *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir. 2001)).

intent.¹¹⁹ This bright line rule, of course, precluded the court from awarding the Fords their attorney's fees.¹²⁰

D. *The Lone Court to Authorize a Fee Award to a Parent-Attorney*

The only court that has actually awarded fees to a parent-attorney is the Federal District Court for the Northern District of Georgia. *Matthew V. v. Dekalb County School System* involved a dispute over an assistive technology evaluation made under the disabled student's IEP.¹²¹ The plaintiff, represented by his mother, a Georgia attorney, prevailed at an administrative hearing, but the administrative law judge did not believe that she had the authority to grant an award of attorney's fees.¹²² The mother-attorney then petitioned the federal district court for an attorney's fee award under § 1415(i)(3)(B).¹²³

The *Matthew V.* court began in a familiar spot, analyzing *Kay* and its applicability to the situation.¹²⁴ After summarizing the rationale of *Kay*, the court noted the decisions in *Woodside* and *Doe*, paying special attention to the fact that those courts had found that parent-attorneys who represent their disabled children in IDEA claims do not act pro se.¹²⁵ However, the court disagreed with the result reached by the *Woodside* and *Doe* courts for four reasons:

119. *Id.* The court stated:

[O]n some occasions, attorney-parents will provide independent, reasoned representation to their children. Given the underlying results, we can only conclude that . . . [the disabled child's mother] "obviously handled h[er] professional responsibilities in this case in a competent manner." Nevertheless, we are convinced that our rule—which presumes irrefutably that parents and guardians are *always* unable to provide independent, dispassionate legal advice—will better serve Congress' intentions.

Id. (quoting *Kay v. Ehrler*, 499 U.S. 432, 435 (1991)). The court never specifically mentioned what "Congress' intention" was, but noted that "awarding attorneys' fees to the Fords would create a disincentive to employ counsel whenever a parent or guardian considered herself competent to litigate on behalf of her child." *Id.* This seems to suggest that the court interpreted Congress's intent to have been to create an incentive for employment of independent, third-party counsel.

120. *Id.*

121. *Matthew V. v. Dekalb County Sch. Sys.*, 244 F. Supp. 2d 1331, 1333 (N.D. Ga. 2003). The disagreement centered on who would pay for an independent evaluation of Matthew's handwriting. When the school refused to pay for the evaluation, Matthew's parents ultimately, after much correspondence with the school system, petitioned for a due process hearing. *Id.* at 1333-34.

122. *Id.* at 1334.

123. *Id.*

124. *Id.* at 1335-36.

125. *Id.* at 1336-37. The court noted the following:

First, nothing in the language of the statute or legislative history prohibited a fee award in these circumstances.¹²⁶ Second, parents and their disabled children are separate legal entities under the IDEA, which satisfies the agency relationship mentioned in *Kay*.¹²⁷ Third, the Georgia Rules of Professional Conduct serve as a check to any kind of attorney misconduct, like failure to adequately consider the risks of representing one's own child.¹²⁸ Finally, an economic analysis of the situation revealed that a parent-attorney may very well be the best attorney available for the cost.¹²⁹ The court held that an attorney's fee award to a parent-attorney is permissible based on "the text of the statute, its legislative history, and the distinctions between the facts here and in *Kay*."¹³⁰ Given the difference in the reasoning between the courts that have decided this issue, it is necessary to take a closer look at the reasoning of those cases and how the IDEA's fee-shifting language should be interpreted.

III. WHY COURTS SHOULD GRANT PARENT-ATTORNEYS THEIR ATTORNEYS' FEES

This section argues that parent-attorneys should be allowed to recover their attorneys' fees. It will begin by examining the problems with the reasoning of the court decisions denying fee

The [Fourth Circuit] first recognized that parents and children are distinct legal entities under the IDEA; thus, it rejected the notion that an attorney-parent's representation of his child in IDEA proceedings actually constitutes *pro se* representation like in *Kay*. . . . The Third Circuit acknowledged that a parent who represents his child under the IDEA does not act *pro se*; nevertheless, the court agreed with the reasoning set forth in *Kay* and *Doe*.

Id. at 1336 (citations omitted).

126. *Id.* at 1337.

127. *Id.*

128. *Id.* at 1337-38.

129. *Id.* at 1338.

130. *Id.* Unfortunately, the Vances were ultimately denied an attorney's fee award because they did not meet the *Buckhannon* prevailing party guidelines. The court summarized its findings with respect to the *Buckhannon* issue:

[T]he Court finds that the [administrative law judge's] determination did not bestow prevailing party status on Plaintiffs because it did not alter the legal relationship between the parties. Moreover, Plaintiffs may not recover based on the catalyst theory after *Buckhannon*. Finally, Defendants' payment to Plaintiffs was a voluntary settlement made without judicial *imprimatur* and so cannot support prevailing party status. Accordingly, Plaintiffs are not entitled to attorney's fees and costs as a matter of law.

Id. at 1343.

awards to parent-attorneys.¹³¹ The analysis will also examine the differences between the situations giving rise to the IDEA cases discussed above¹³² and the *Kay* decision. The analysis will then include an examination of the plain language of the statute, which appears to allow recovery, and view it in the context of the legislative history and overall purpose of the IDEA. It will then look to factors beyond statutory language and precedent, namely economic and practical concerns, much like the *Matthew V.* court did.¹³³ Finally, the analysis will conclude that the totality of the foregoing circumstances—the statutory language, the inapplicability of *Kay*, and economic concerns—mandates a finding that parent-attorneys recover their attorneys' fees.

A. *Kay v. Ehrler Should Not Apply to IDEA Cases*

Every IDEA fee-shifting case that has been decided on this issue has included a detailed discussion of the Supreme Court's decision in *Kay*.¹³⁴ These cases can be divided into two groups: the early cases, which ruled that *Kay* applied because parent-attorneys were proceeding pro se when representing their disabled children,¹³⁵ and the later cases (after 1998), which held that even though parent-attorneys are not proceeding pro se, the situation is close enough to pro se representation that *Kay* should still apply.¹³⁶

There are three fundamental reasons why *Kay* should not apply to IDEA actions in the parent-attorney context and why the holdings that denied fees are erroneous. First, when a parent brings a claim that her child's right to a FAPE has been violated, she is not acting pro se, as was the case with the attorney who represented himself in *Kay*, but rather she is representing her child. Second, parent-attorney representation does not carry with it the same con-

131. See *Ford v. Unified Sch. Dist.*, 461 F.3d 1087, 1091 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 604 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260, 263 (4th Cir. 1998); *Rappaport v. Vance*, 812 F. Supp. 609, 612 (D. Md. 1993); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905, 906-07 (Ind. 1996).

132. See *Ford*, 461 F.3d at 1091; *S.N.*, 448 F.3d at 604; *Woodside*, 248 F.3d at 131; *Doe*, 165 F.3d at 263; *Matthew V.*, 244 F. Supp. 2d at 1336; *Rappaport*, 812 F. Supp. at 612; *Miller*, 665 N.E.2d at 906-07.

133. See *Matthew V.*, 244 F. Supp. 2d at 1337-38.

134. See *Ford*, 461 F.3d at 1091; *S.N.*, 448 F.3d at 604; *Woodside*, 248 F.3d at 131; *Doe*, 165 F.3d at 263; *Matthew V.*, 244 F. Supp. 2d at 1336; *Rappaport*, 812 F. Supp. at 612; *Miller*, 665 N.E.2d at 906-07.

135. See *Rappaport*, 812 F. Supp. at 612; *Miller*, 665 N.E.2d at 907.

136. See *Ford*, 461 F.3d at 1091; *S.N.*, 448 F.3d at 604; *Woodside*, 248 F.3d at 131; *Doe*, 165 F.3d at 263.

cerns about insufficient representation as the type of representation involved in *Kay*. Finally, after the 1997 amendments to the IDEA, the statutory fee-shifting language is no longer similar to that of § 1988(b) or other civil rights statutes, and should be interpreted independently. In fact, *Kay* has no applicability to the IDEA fee-shifting situation and should not be applied as a bar to recovery of attorneys' fees for parent-attorneys.

1. Parents and Disabled Children are Separate Legal Entities Under the IDEA

The early cases, *Miller* and *Rappaport*, denied fees based on the theory that parent-attorneys were proceeding pro se, like the attorney in *Kay*, and, therefore, *Kay* barred an award.¹³⁷ However, the statutory rights given to parents and disabled children under the IDEA are separate and distinct rights.¹³⁸ While parents enjoy limited procedural rights in certain contexts, the disabled child's right is substantive in nature. Because of this dichotomy, it is logically impossible for a parent to act pro se when challenging the denial of a FAPE—a substantive right that belongs only to the child.¹³⁹ Therefore, the prototypical situation present in the IDEA cases is not analogous to that in *Kay*, and the holding of that case should not apply to the parent-attorney scenario.

There can be no doubt that parents possess a number of rights under the IDEA.¹⁴⁰ One such right is the right to sue if the parent qualifies as a "party aggrieved."¹⁴¹ Yet, the rights that parents possess are only procedural and are separate and distinct from the substantive rights of their disabled children.

The IDEA specifically sets out the procedural rights of a parent. For example, under §§ 1414 and 1415, parents have a variety of

137. *Rappaport*, 812 F. Supp. at 611-12 (citing *Kay v. Ehrler*, 499 U.S. 432, 435-37 (1991)); *Miller*, 665 N.E.2d at 906 (citing *Kay*, 499 U.S. at 435-37).

138. See *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2002 (2007) (stating that the rights of parents and their disabled children under the IDEA are separate rights); *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299 (4th Cir. 2005) (stating that the "real party in interest" is the child who suffers the "core-injury," not the parent); *Doe*, 165 F.3d at 262-63 (stating that the focus of the IDEA is on the child and not the parent); *Matthew V.*, 244 F. Supp. 2d at 1337 (stating that parents and their disabled children are separate legal entities under the IDEA).

139. *Winkelman*, 127 S. Ct. at 2010 (Scalia, J., concurring). Recall also that some of the courts that decided the parent-attorney fee award question also held that the rights of the parent and the disabled child were distinct. See, e.g., *Doe*, 165 F.3d at 262-63.

140. *Winkelman*, 127 S. Ct. at 2002.

141. 20 U.S.C. § 1415(i)(2)(A) (2000).

rights in the development and maintenance of their disabled child's IEP.¹⁴² The Supreme Court recognized some of these rights in *Winkelman*—for example, the right to have an active role in developing and maintaining their child's IEP, the right to be part of all decision-making processes, and the right to have access to their child's educational records.¹⁴³ Parents have a long list of procedural rights upon which they could sue if they were denied the right of involvement in their child's IEP and if they were a "party aggrieved" under the statute.¹⁴⁴

However, the right to a FAPE clearly belongs to the disabled child and *not* the parent. The explicit overall purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education"¹⁴⁵ As Justice Scalia aptly noted in his *Winkelman* concurrence, "[t]he parents of a disabled child no doubt have an *interest* in seeing their child receive a proper education. But there is a difference between an *interest* and a statutory *right*. The text of the IDEA makes clear that parents have no *right* to the education itself."¹⁴⁶ Since the claims in *Ford*, *S.N.*, *Matthew V.*, *Woodside*, *Doe*, *Miller*, and *Rappaport* challenged the functionality of the disabled child's IEP, and therefore whether the child was receiving a FAPE,¹⁴⁷ the legal claims were based on the substantive rights of the child, not any right possessed by the parents. Thus, the parent-attorneys were not acting *pro se*, and they were not suing as "parties aggrieved" under the IDEA.¹⁴⁸ Rather, they were serving as counsel for their disabled children.¹⁴⁹

142. See, e.g., *id.* § 1414(d)(1)(B)(i) (parents must be members of their child's IEP team); *id.* § 1415(b)(1) (parents must have an opportunity to examine records and participate in IEP meetings); *id.* § 1415(b)(6)-(8) (parents may file administrative due process complaints in subsequent administrative challenges).

143. See *Winkelman*, 127 S. Ct. at 2000 (listing the statute's provisions and the rights guaranteed by them).

144. See *id.* at 2008 (Scalia, J., concurring) ("Because the rights to . . . the various procedural protections are accorded to parents themselves, they are 'parties aggrieved' when those rights are infringed, and may accordingly proceed *pro se* when seeking to vindicate them.").

145. 20 U.S.C. § 1400(d)(1)(A).

146. *Winkelman*, 127 S. Ct. at 2008 (Scalia, J., concurring).

147. See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1088-89 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 602 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 130 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260, 261 (4th Cir. 1998); *Matthew V. v. DeKalb County Sch. Sys.*, 244 F. Supp. 2d 1331, 1333-34 (N.D. Ga. 2003); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905, 906 (Ind. 1996); *Rappaport v. Vance*, 812 F. Supp. 609, 610 (D. Md. 1993).

148. *Winkelman*, 127 S. Ct. at 2007-11 (Scalia, J., concurring).

149. *Id.*

The majority of courts since 1998 have, in fact, found that parent-attorneys were not acting *pro se* when representing their disabled children when challenging the adequacy of an IEP.¹⁵⁰ As one district court put it, “no precedent known to the court has held that a lawyer who represents his child is acting *pro se*.”¹⁵¹ This distinguishes the parent-attorney cases from the legal relationship that was in place in *Kay*.

In *Kay*, the petitioner sued for a fee award based on the successful litigation of a violation of his own civil rights.¹⁵² The legal claim arose out of the violation of the petitioner’s substantive rights, and there was no question that the attorney was representing himself.¹⁵³ In the IDEA cases, the basis for the legal claim does not arise from a violation of the parent-attorney’s substantive rights under the IDEA, but rather from a violation of her disabled child’s substantive right to a FAPE.¹⁵⁴ Thus, from a legal standpoint, the representation involved in *Kay* and the IDEA cases are dissimilar. Parent-attorneys are not proceeding *pro se* in IDEA cases, and *Miller* and *Rappaport*’s reliance on *Kay* was misplaced.

2. Parent-Attorney Representation in IDEA Cases Does Not Warrant the Same Concerns About Inadequate Representation as Were Present in *Kay*

The later cases that denied fees—*Doe*, *Woodside*, *S.N.*, and *Ford*—did not base their decisions on a *pro se* rationale. Instead, they reasoned that parent-attorney representation of a disabled child in an IDEA claim embodies the same dangers as the *pro se* representation in *Kay*, and thus, should be treated similarly.¹⁵⁵ Specifically, these courts were concerned that emotion, rather than reason, would control the conduct of parent-attorneys who were

150. See, e.g., *Doe*, 165 F.3d at 262-63 (holding that parent-attorneys are not acting *pro se*). Of all the cases discussed in Part II of this Note, only *Rappaport* and *Miller* held that the parent-attornies were actually acting *pro se* when representing their disabled children in this context. See *Rappaport*, 812 F. Supp. at 611-12; *Miller*, 665 N.E.2d at 906; *supra* notes 89-125 and accompanying text.

151. *McLaughlin v. Boston Sch. Comm.*, 976 F. Supp. 53, 65 (D. Mass. 1997).

152. *Kay v. Ehrler*, 499 U.S. 432, 433-34 (1991).

153. See *id.* at 435.

154. See *supra* note 144 and accompanying text.

155. See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1091 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 604 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260, 263 (4th Cir. 1998).

representing their children, and that this could be avoided by obtaining independent counsel.¹⁵⁶

This argument does not take into account the professional rules of conduct of every state that provide for situations just like this, namely, when there is a danger that representation may be inadequate due to a lawyer's personal interests and emotional attachment to a case.¹⁵⁷ The penalties for disobeying these rules are sufficient to meet the concern that parent-attorneys will not adequately represent their "clients."¹⁵⁸ These rules are set up in order to regulate conduct among members of the legal profession. It is not the role of the judiciary to step in and add additional limitations on representation. Otherwise, courts could limit who could appear before them in any given context.

Ironically, these same courts that voiced concerns over whether a parent-attorney's representation was independent and dispassionate enough to be competent went on to find that the parent-attorneys did, in fact, do a competent and professional job.¹⁵⁹ Thus, not only are the concerns over inadequate representation adequately checked by local rules of conduct, but they are also negated by the factual circumstances surrounding the various cases. While this does not guarantee that future parent-attorneys will be

156. *Doe*, 165 F.3d at 263; see also *Ford*, 461 F.3d at 1091 ("[A] disabled child represented by his or her parent does not benefit from the judgment of an independent third party."); *S.N.*, 448 F.3d at 603 ("[A] parent-attorney representing his child 'is deprived of the judgment of an independent third party in framing the theory of the case, . . . formulating legal arguments, and in making sure that reason, rather than emotion, informs his tactical decisions.'" (quoting *Kay*, 499 U.S. at 437)); *Woodside*, 248 F.3d at 131 ("[T]he danger of inadequate representation is as great when an emotionally charged parent represents his minor child as when the parent represents himself.").

157. See, e.g., MASS. RULES OF PROF'L CONDUCT R. 1.1 (2008), available at <http://www.mass.gov/obcbbbo/RPC.pdf> ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."); *id.* at R. 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests.").

158. See *Matthew V.*, 244 F. Supp. 2d at 1338. The Professional Rules of Conduct in most states provide for disbarment, reprimand (both public and private), and suspension as discipline for violations.

159. E.g., *Ford*, 461 F.3d at 1091 (noting that the parent-attorney "'obviously handled h[er] professional responsibilities in this case in a competent manner.'" (quoting *Kay*, 499 U.S. at 435)); *Doe*, 165 F.3d at 263 ("Mr. Doe obtained an excellent result for Tom . . . and . . . we do not in any way denigrate his care and effort in representing his son . . ."); see also *Amy M. v. Timberlane Reg'l Sch. Dist.*, No. CIV. 99-269-B, 2000 WL 1513769, at *5 (D.N.H. Aug. 11, 2000) ("[T]he School District has pointed to nothing that suggests Chase [the relative-attorney] lacked the necessary independence to represent Amy's interests . . .").

equally as successful or competent, it demonstrates that bright-line bars on recovery based on the possibility of inadequate representation are not based on the factual history of the cases. Rather, they are based on paternalistic concerns about hypothetical conduct.

Parent-attorneys are not acting *pro se* when they represent their disabled children. Concerns about inadequate representation based on a lack of independent judgment are adequately checked by professional rules of conduct. Given this, the comparison between *pro se* representation in the parent-attorney IDEA context and *pro se* representation in *Kay* is simply improper.

3. The IDEA's Fee-Shifting Provision Differs from the Provision Interpreted in *Kay*

In addition to the fact that a parent-attorney is not acting *pro se* when representing her disabled child, the statute at issue in *Kay* is fundamentally different from the IDEA's current fee-shifting provision. *Kay* interpreted 42 U.S.C. § 1988(b),¹⁶⁰ a statute whose resemblance to the IDEA has diminished over time due to the subsequent amendments to each.

When *Kay* was decided in 1991, the language of § 1988(b) was still the same as it had been when it was enacted as part of the Civil Rights Attorney's Fees Awards Act of 1976.¹⁶¹ The statute read, "in any civil action or proceeding . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."¹⁶² This language is similar to the IDEA's fee-shifting language prior to the 1997 amendments, which read, "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party."¹⁶³ The Supreme Court declared in 1989 that the "'fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike."¹⁶⁴ Thus, it appears that at least those cases decided before the 1997 amendments to the IDEA—*Rappaport* and

160. *Kay*, 499 U.S. at 433.

161. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b)).

162. *Id.*

163. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2, 100 Stat. 796, 796 (codified as amended at 20 U.S.C. §§ 1440-45).

164. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (quoting *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973)).

Miller—correctly interpreted the IDEA's fee-shifting language as parallel to that of § 1988.¹⁶⁵ Interestingly, however, the same year that *Kay* was decided, a district court interpreting the IDEA noted that "plaintiffs' motion for fees is based on the EHA, a different statutory scheme from that which formed the basis of the *Kay v. Ehrler* decision."¹⁶⁶ Clearly, the two statutes were sufficiently different to warrant distinct interpretations by at least one court.¹⁶⁷

In 1997, the IDEA's fee-shifting statute was amended and a series of exceptions were added to bar or reduce the award of attorneys' fees in certain circumstances.¹⁶⁸ By the time the first federal appellate court examined the parent-attorney fee award issue under the IDEA, the statute that had been interpreted in *Kay* and the new incarnation of the IDEA's fee-shifting provision had little in common,¹⁶⁹ beyond the template language granting the court dis-

165. However, these cases would still have to account for the fact that the real party at interest is the child, not the parent, and thus the parents were not acting pro se like the plaintiff in *Kay*.

166. *Kattan v. Dist. of Columbia*, No. 88-0630, 1991 WL 222312, at *1 (D.D.C. Oct. 17, 1991), *aff'd*, 995 F.2d 274 (D.C. Cir. 1993).

167. In 1996, § 1988(b) was amended under the Federal Courts Improvement Act. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (codified at 42 U.S.C. § 1988(b)). An exception was added that barred a fee award in actions against judicial officers acting in their official capacity. *See* 42 U.S.C. § 1988(b). This exception, which is still in effect in the current version of the law, is not present in the IDEA's fee-shifting statute, thus differentiating the two even further. *See id.*

168. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified at 20 U.S.C. § 1400); *supra* note 39.

169. Read together the two statutes are strikingly dissimilar. Currently, § 1988(b) states that:

In any action or proceeding to enforce a provision . . . of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b). On the other hand, § 1415(i)(3)(B), (D)-(E) states that:

(B) Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

. . . .

(D) Prohibition of attorneys' fees and related costs for certain services

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

cretion to award reasonable fees.¹⁷⁰ Certainly by 1997, the two statutes had drastically evolved from what they were when first enacted in 1976 and 1986, respectively, which only provides stronger evidence that *Kay* should not be applied in the IDEA context, especially when combined with the fact that parent-attorneys are not proceeding pro se, and thus any concerns over inadequate representation are unwarranted.¹⁷¹

B. *The Plain Language of the Statute and Its Legislative History Demonstrate Congress's Intent to Allow Parent-Attorneys to Recover Their Attorneys' Fees*

Since *Kay* should not apply to IDEA cases, it becomes necessary to discuss how the IDEA's fee-shifting provision should be interpreted and why the prior interpretations by courts were incorrect. When interpreting any statute, the Supreme Court has stated: "[w]e begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."¹⁷² Therefore, the starting point for the examination of the IDEA's fee-shifting provision must be the language of the statute itself.

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

20 U.S.C. § 1415(i)(3)(B), (D)-(E) (2000).

170. See 20 U.S.C. § 1415(i)(3)(B); 42 U.S.C. § 1988(b). Yet, if this standard threshold language were the only measuring stone, many statutes that authorize recovery of attorneys' fees would have to be interpreted in concert.

171. See *supra* Parts III.A.1-2.

172. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

1. The Plain Language of the Statute Allows Parent-Attorneys to Recover

Given the Supreme Court's instruction,¹⁷³ most courts that have decided against awarding parent-attorneys their attorneys' fees curiously gave little credence to the specific language of the IDEA's fee-shifting provision.¹⁷⁴ Under that provision of the IDEA, a court, in its discretion, may award reasonable attorneys' fees to parents who are prevailing parties.¹⁷⁵ The Court of Appeals for the Ninth Circuit was the only court who denied a fee award despite analyzing the plain language of the statute.¹⁷⁶ None of the other courts that denied fees examined the plain language at all.¹⁷⁷

According to the plain language, if the court finds that giving an award is within its discretion, it can award fees to a prevailing party who is the parent of a disabled child.¹⁷⁸ Certainly, all of the parents who petitioned the court for fee awards in the cases examined were parents of a disabled child. Thus, the only reasons for denying an award would be if the parents were not "prevailing parties," or if the statutory exceptions to a fee award applied.¹⁷⁹ Depending on the outcome, there may be some question as to whether the parent-attorneys in any given case actually meet the definition of "prevailing party" under *Buckhannon*.¹⁸⁰ However, that should not serve as a complete bar to the ability of all parent-attorneys to

173. *See id.*

174. *See* *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 603 (2d Cir. 2006) (discussing only the plain language of the statute in comparison to § 1988 in deciding whether or not to apply *Kay*); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 130-31 (3d Cir. 2001) (quoting the language of 20 U.S.C. § 1415(i)(3)(B), yet without discussing it, basing its decision entirely upon *Doe*); *Doe v. Bd. of Educ.*, 165 F.3d 260, 261-62 (4th Cir. 1998) (disregarding the Does' contention that the plain language allows fees); *Rappaport v. Vance*, 812 F. Supp. 609, 611-12 (D. Md. 1993) (ignoring the statutory language completely and looking to whether the provision should be interpreted in consonance with Title VII of the Civil Rights Act of 1964); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905, 906-07 (Ind. 1996) (disregarding the meaning of the IDEA's fee-shifting language and instead likening its language to Title VII of the Civil Rights Act of 1964 and applying *Kay*).

175. 20 U.S.C. § 1415(i)(3)(B).

176. *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1090 (9th Cir. 2006) (The *Ford* court observed that, "applying the plain meaning of the provision, the Fords appear to be entitled to fees.").

177. *See supra* note 174 and accompanying text (explaining where the courts that denied fees began their analyses).

178. *See* 20 U.S.C. § 1415(i)(3)(B).

179. *See supra* notes 36-40 and accompanying text for a list of the statutory exceptions, none of which apply in any of the cases examined.

180. *See supra* note 46 and accompanying text.

recover.¹⁸¹ Since the parent-attorneys were not barred from recovery by any of the statutory exceptions, the basis of denial had to be due to the fact that the parents of the disabled child were also attorneys. Indeed, the court in *Amy M. v. Timberlane Regional School District* acknowledged that, “[t]he only limitation that the IDEA imposes on the recovery of attorney’s fees by a prevailing party relate to the circumstances under which the fees were incurred, [not] the status of the person who incurred the fees.”¹⁸²

2. The IDEA’s Fee-Shifting Statute Already Contains Circumstances in Which Parents are Excluded from Recovery of Fees.

The attorney’s fees provision of the IDEA includes express exceptions.¹⁸³ Given that parent-attorneys are not barred from recovery except under the exceptions, it can be inferred that Congress did not intend to bar their recovery except within those exceptions. Moreover, § 1415(i)(3)(E) even provides an exception to the exception, demonstrating that Congress had thoroughly considered all of the potential consequences of adopting the language barring a fee award in certain circumstances.¹⁸⁴ Therefore, in determining how to interpret the language of § 1415(i)(3)(B)-(E), the doctrine of *expressio unius est exclusio alterius* applies and “instructs that when certain matters are mentioned . . . other similar matters not mentioned were intended to be excluded.”¹⁸⁵

Since there is already language that bars a fee award in certain circumstances it is a reasonable assumption that Congress intended these to be the only circumstances in which fees should be barred. Indeed, the court in *Matthew V.* correctly noted, “[i]f Congress had wished to preclude the award of fees in these [the parent-attorney situation] circumstances, it would have said so in its list of other

181. See, e.g., *Matthew V. v. Dekalb County Sch. Sys.*, 244 F. Supp. 2d 1331, 1338 (N.D. Ga. 2003) (where the parents were deemed able to recover a fee award but were denied because they did not have “prevailing party” status under *Buckhannon*).

182. *Amy M. v. Timberlane Reg’l Sch. Dist.*, No. CIV. 99-269-B, 2000 WL 1513769, at *4 (D.N.H. Aug. 11, 2000).

183. See *supra* note 169, which recites the language of 20 U.S.C. § 1415(i)(3)(D).

184. 20 U.S.C. § 1415(i)(3)(E) (2000) (“Notwithstanding subparagraph (D), an award of attorneys’ fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.”).

185. *Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Constr. Co., Inc.*, 932 F.2d 1443, 1449 (11th Cir. 1991); see also RONALD BENTON BROWN & SHARON JACOBS BROWN, *STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT* 78-81 (2002) (discussing the phrase *expressio unius est exclusio alterius*, meaning that the expression of one thing implies the exclusion of others).

exclusions.”¹⁸⁶ Thus, both the plain language of § 1415(i)(3)(B) and an interpretation of the sections immediately following and pertaining directly to it, suggest parent-attorneys should be allowed to recover.

3. The Legislative History Supports the Position That
Parent-Attorneys Should be Allowed to Recover
Their Attorneys’ Fees

a. *The Handicapped Children’s Protection Act and its Legislative History*

There has been no substantial discussion of the plain meaning of the IDEA’s fee-shifting provision in any of the cases examined, and courts have differed considerably in their rationale for denying fee awards.¹⁸⁷ Equally true is the fact that the provision has been interpreted to allow parents who hire independent attorneys to recover their fees.¹⁸⁸ Thus, the IDEA’s fee-shifting provision is open to various interpretations depending on the occupation of the parent bringing the action on behalf of her child. When a statute is subject to multiple interpretations, the intent of the legislature may be considered in order to ascertain the proper interpretation.¹⁸⁹ The intent of the legislature can be inferred from the legislative history surrounding the adoption of the law.¹⁹⁰ Thus, the place to begin when looking at the legislative history of the IDEA’s fee-shifting provision is the adoption of the HCPA in 1986, which for the first time provided prevailing parents of disabled children with a vehicle for financing expensive litigation costs.¹⁹¹

The primary purpose of the HCPA was to overturn the Supreme Court’s decision in *Smith v. Robinson*, which barred recov-

186. *Matthew V.*, 244 F. Supp. at 1337.

187. Compare *Rappaport v. Vance*, 812 F. Supp. 609, 612 (D. Md. 1993) (denying an award because the parent-attorney was proceeding pro se and because the IDEA’s fee-shifting provision was akin to Title VII’s), with *Doe v. Bd. of Educ.*, 165 F.3d 260, 263 (4th Cir. 1998) (denying fees due to an alleged similarity to the type of representation involved in *Kay*).

188. See, e.g., *A.R. ex rel. R.V. v. N.Y. City Dep’t of Educ.*, 407 F.3d 65, 75 (2d Cir. 2005) (“[T]he parties agree, as do we, that a plaintiff who receives IHO-ordered relief on the merits in an IDEA administrative proceeding is a ‘prevailing party.’ He or she may therefore be entitled to payment of attorneys’ fees under the IDEA’s fee-shifting provisions.”).

189. See Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 10 (2003).

190. See *id.*

191. See Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, § 2(B), 100 Stat. 796, 796 (codified at 20 U.S.C. § 1415(i)(3)(B) (2000)).

ery of attorneys' fees by a parent under the EAHCA.¹⁹² A secondary purpose was to require parents to exhaust their remedies under the statute before instituting litigation or trying to recover their fees under another statute.¹⁹³ The specific language adopted for the fee-shifting provision intentionally paralleled the language of other civil rights statutes.¹⁹⁴ In the congressional debates over the bill, Representative Williams from Montana stated, "[t]his bill provides to handicapped children and their parents the same rights, no more, no less, that are provided to all other groups under the other Civil Rights Acts of the United States."¹⁹⁵ Similarly, Representative Biaggi from New York stated, "[t]he whole purpose of attorney's fees provisions is to help equalize the balance of power and

192. S. REP. NO. 99-112, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1798, 1799. The committee report indicated that "Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents." It went on to say:

The situation which has resulted from the *Smith v. Robinson* decision was summarized by Justices Brennan, Marshall, and Stevens in their dissenting opinion: "Congress will now have to take the time to revisit the matter." Seeking to clarify the intent of Congress with respect to the educational rights of handicapped children guaranteed by the EHA, the Handicapped Children's Protection Act of 1985 was introduced

Id.; *see also* 131 CONG. REC. 31,370 (1985) (statement of Rep. Williams) ("The original bill was designed to accomplish four basic objectives Second, to reestablish statutory rights repealed by the U.S. Supreme Court in the decision in [*Smith v. Robinson*]."). The Court held in *Smith* that the EAHCA, with its lack of a fee-shifting provision, was the exclusive avenue through which claims could be pursued. Parents were thus not able to recover attorneys' fees in actions under that statute. *See Smith v. Robinson*, 468 U.S. 992, 1021 (1984); *see supra* notes 23-41 for a discussion of *Smith*.

193. S. REP. NO. 99-112, at 15. The committee report stated:

[N]othing i[n] S. 415 should be interpreted to allow parents to circumvent the due process procedures and protections created under the EHA. For example, under the EHA parents must generally exhaust administrative remedies to attempt to resolve certain disagreements before filing a civil court action. Section 3 makes it clear that when parents choose to file suit under another law that protects the rights of handicapped children (e.g., section 504 of the Rehabilitation Act), if that suit could have been filed under the EHA, then parents are required to exhaust EHA administrative remedies to the same extent as would have been necessary if the suit had been filed under the EHA.

Id. The reference to "S. 415" in the Senate Report was to the version of the HCPA that the Senate reviewed.

194. *See id.* at 14. The report stated that "[t]he committee also intends that section 2," the fee-shifting provision, "should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964" *Id.*

195. 131 CONG. REC. 31,377 (statement of Rep. Williams). Thus, it seems that the court in *Rappaport v. Vance* (a case decided before the 1997 IDEA amendments) was correct in examining how Title VII had been construed and stating, "[i]f the rules regarding Title VII attorney's fees are strictly applied to IDEA, Plaintiff cannot recover fees as a *pro se* litigant." *Rappaport v. Vance*, 812 F. Supp. 609, 611 (D. Md. 1993).

to enable those protected by civil rights statutes to pursue the procedures established by Congress."¹⁹⁶

However, a closer inspection of the legislative history surrounding the HCPA's adoption in 1986 also illuminates another congressional purpose: to encourage parents to exercise their right to be involved in the educational planning for their handicapped child.¹⁹⁷ The Senate Report acknowledged this point, concluding that parents needed to have available to them all possible remedies to advance their disabled child's rights.¹⁹⁸ Further, as Representative Biaggi pointed out:

There can be no doubt that an attorney's fee provision for the EHA which reimburses prevailing parents for fees incurred in the administrative as well as judicial proceedings will be a critical tool for . . . parents seeking to secure Congress' guarantee of an appropriate education for their children.¹⁹⁹

Moreover, Representative Miller of California expressed the need for convenience in order to foster greater parental advocacy:

[W]ithout parental advocacy on behalf of handicapped children, these children's access to a free appropriate public education will be further jeopardized.

. . . Neither I nor others who wrote the law intended that parents should be forced to expend valuable time and money . . . to gain for their children an education which meets their individual needs.²⁰⁰

Thus, while in 1986 Congress definitely intended for the IDEA's fee-shifting language to parallel that of other civil rights statutes, there was another important interest in the balance—advancing the right of parents to undertake litigation to further their child's substantive right to a free appropriate public education.

What is clear is that parent-attorneys, as parents of disabled children, should be treated no differently than nonattorney parents. Congress's aim of easing the ability of parents to advocate on behalf of their children applies equally to them. Examining the legislative history of the 1997 amendments to the IDEA will help

196. 131 CONG. REC. 31,375 (statement of Rep. Biaggi).

197. See *id.* at 31,376 (statement of Rep. Miller) ("Parents' involvement in the education of their handicapped child is not only essential to the task, it is a right specifically included in the law.").

198. S. REP. NO. 99-112, at 17.

199. 131 CONG. REC. 31,375 (statement of Rep. Biaggi).

200. *Id.* at 31,376 (statement of Rep. Miller).

elucidate the confusion created by these two Congressional intentions and their relation to parent-attorneys.

b. The Legislative History of the 1997 Amendments to the IDEA

In 1997, Congress enacted many alterations to the IDEA, including a change to the language of the fee-shifting provision that added certain limitations to parental recovery of attorneys' fees.²⁰¹ The purpose of adding these limitations, and the exception to the exception under § 1415(i)(3)(E), was to foster greater parental involvement in all stages of the process.²⁰² This goal is consistent with the statements of Representatives Biaggi and Miller in explaining the purpose of the adoption of the fee-shifting provision in 1986.²⁰³

Congress also recognized that one of the goals of the HCPA's initial fee-shifting provision was to mirror the language of other civil rights statutes.²⁰⁴ As Senator Harkin from Iowa correctly noted, any departure from the original language would alter the similarity between the IDEA's fee-shifting language and that of the civil rights statutes it was modeled after:

[Senator Hatch, the bill's author,] modeled the IDEA fees provisions on provisions in other civil rights laws. On final passage of these provisions he explained that they reflected a carefully crafted compromise that provides for reasonable attorneys fees to a prevailing parent while at the same time protecting against excessive reimbursement.

201. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 615, 111 Stat. 37, 92 (codified at 20 U.S.C. § 1415).

202. See S. REP. NO. 105-17, at 5 (1997) stating, "[t]his authorization is viewed by the committee as an opportunity to review, strengthen, and improve IDEA to better educate children with disabilities and enable them to achieve a quality education by . . . [s]trengthening the role of parents" The Senate Report further stated:

The committee believes that the IEP process should be devoted to determining the needs of the child and planning for the child's education with parents and school personnel. To that end, the bill specifically excludes the payment of attorneys' fees for attorney participation in IEP meetings, unless such meetings are convened as a result of an administrative proceeding or judicial action.

Id. at 25-26.

203. See *supra* notes 199-200 and accompanying text.

204. See 143 CONG. REC. 8181 (1997) (statement of Sen. Harkin).

Let's not upset that carefully crafted compromise. Let's retain the parity between the fees provisions in the IDEA with the fees provisions in other civil rights statutes.²⁰⁵

However, Senator Harkin's point of view was rejected by Congress when it enacted the alterations to the fee-shifting provision and departed from the original language of the HCPA.²⁰⁶ Since the IDEA's original language was modeled on existing civil rights statutes, any departure from that language must be seen as congressional intent to depart from the parallels between the IDEA's fee-shifting provision and those upon which it was modeled.

This presents an interesting dichotomy. Because they were decided before the 1997 amendments were adopted, the *Rappaport* and *Miller* decisions were correct *at that time* in interpreting the IDEA consistently with other similarly worded civil rights statutes.²⁰⁷ However, the decisions since the 1997 amendment have not taken note of the consequences of Congress's alterations to the IDEA's fee-shifting language.²⁰⁸ Instead, those decisions relied solely on comparing the IDEA cases to *Kay*, based on the pro se representation analysis and the misplaced concerns that it embodies.²⁰⁹ Yet, in the parent-attorney IDEA cases, those concerns are without merit.²¹⁰ Thus, only the court in *Matthew V.* correctly interpreted the IDEA's fee-shifting provision.

205. *Id.* Senator Harkin was arguing against an amendment to the fee-shifting language already in existence. "I rise in strong opposition to the . . . amendment which adds limitations on the awarding of attorneys fees to parents of disabled children that are unprecedented in any other fees provision." *Id.*

206. *See* 20 U.S.C. § 1415(i)(3)(D)-(E) (2000)).

207. *Rappaport v. Vance*, 812 F. Supp. 609, 611-12 (D. Md. 1993); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905, 906-07 (Ind. 1996); *see also* S. REP. NO. 99-112, at 14 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1798, 1804 ("The committee also intends that section 2 [the fee-shifting provision] should be interpreted consistent with fee provisions of statutes such as title VII of the Civil Rights Act of 1964 . . ."). Where *Rappaport* and *Miller* erred was in applying *Kay* because parent-attorneys are not proceeding pro se.

208. *See Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 602 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998).

209. *See Ford*, 461 F.3d at 1090-91; *S.N.*, 448 F.3d at 603-05; *Woodside*, 248 F.3d at 131; *Doe*, 165 F.3d at 261-63; *Rappaport*, 812 F. Supp. at 611-12; *Miller*, 665 N.E.2d at 906-07.

210. *See supra* Part III.A. for discussion of why *Kay* does not apply to IDEA cases.

C. *Where the Matthew V. Court Went Right and Others Went Wrong: Looking Beyond Kay and Outside the Box*

The *Matthew V.* court was the only court to hold that parent-attorneys should be able to recover their attorneys' fees under the IDEA's fee-shifting provision.²¹¹ The *Matthew V.* court supported its conclusion with four main points.²¹² The first three are echoed in the conclusions of this Note: parent-attorneys should be able to recover their fees because (1) the statutory language does not prohibit these awards, (2) parents and their disabled children are separate legal entities under the IDEA, and (3) the professional rules of conduct serve as a check on inadequate representation.²¹³ However, where the *Matthew V.* court truly distanced itself from other courts was by including practical, realistic, and economic concerns in its considerations.²¹⁴

In addition to all that has been said about statutory language, interpretation, and applicability of case law, there remains the important concern that the purpose of enacting a fee-shifting provision as part of the IDEA was to provide "a critical tool for . . . parents seeking to secure Congress' guarantee of an appropriate education for their children."²¹⁵ As such, there are basic considerations of economic and practical feasibility that must be considered in litigating an IDEA claim, especially in light of the statute's overall purpose.

The *Matthew V.* court was the only court to examine the economic strain put on parents in the process of litigating an IDEA claim.

[A] brief economic analysis suggests that attorney's fees should be available under these circumstances. Even though a parent-attorney may be his child's most valuable advocate as a parent, as an attorney, the parent is subject to opportunity costs inherent in performing legal work for her child rather than for a paying client.²¹⁶

211. *Matthew V. v. DeKalb County Sch. Sys.*, 244 F.Supp. 2d 1331, 1337-38 (N.D. Ga. 2003).

212. *Id.*

213. *Id.*

214. *Id.* at 1338 (discussing the economic and time-management concerns surrounding the parent-attorney IDEA situation).

215. 131 CONG. REC. 31,375 (1985) (statement of Rep. Biaggi).

216. *Matthew V.*, 244 F. Supp. 2d at 1338.

The court's observation is inherently true, as every hour a parent-attorney spends researching and litigating his disabled child's IDEA claim is another hour not spent with a "paying client."²¹⁷

A report conducted in 2003 by the Special Education Expenditure Project (SEEP) provided figures on the costs and the success rate of parents litigating IDEA cases.²¹⁸ The study found that average litigation expenses for an IDEA claim are approximately \$95,000.²¹⁹ Litigation success rates for unrepresented parents amounted to only forty-three percent.²²⁰ Parents who were represented by an attorney had an increase in their success rate of anywhere from twenty to twenty-seven percent.²²¹ While retaining an attorney obviously helped parents and their disabled children in prevailing in their IDEA claims, the financial burden of litigation may be too much even for moderately wealthy families, not to mention for lower-or middle-class families.

Moreover, as an economic and practical concern, attorneys may not be readily available given the amount of time and money necessary to litigate an IDEA claim.²²² This was similar to the problem faced by Michael McLaughlin in *McLaughlin v. Boston School Committee*,²²³ where the claim was based on racial discrimi-

217. *Id.*

218. Daggett, *supra* note 37, at 25-26. The SEEP is part of the Center for Special Education Finance (CSEF). See CSEF/SEEP: Center for Special Education Finance & Special Education Expenditure Project, <http://www.csef-air.org/> (last visited Mar. 15, 2009).

219. JAY G. CHAMBERS, JENIFER J. HARR, AMYNAH DHANANI, SPECIAL EDUC. EXPENDITURE PROJECT, WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000?, at 8, (2003) available at <http://csef.air.org/publications/seep/national/Procedural%20Safeguards.PDF>.

220. Daggett, *supra* note 37, at 26. These success rates include cases in which parents only partially prevailed. *Id.* It should also be noted that in most of these cases, the parents who represented their child were likely not attorneys. Had they not been included, success rates would likely have been higher. *Id.*

221. See *id.* at 24.

222. See *supra* Part I.D. Recall the lengthy administrative process that must be fulfilled before a claim can even get before a judge. Time and money spent may be additionally increased because it often takes significant use of expert witnesses to actually prove that the school district violated the child's substantive right to a FAPE. See Crary, *supra* note 4, at 968. Crary suggests,

that the use of expert witnesses in these IDEA actions is both necessary and costly. Before filing suit against a school district, special education attorneys recommend that parents obtain "strong, believable" expert witness testimony, because such testimony, often in the form of evaluations or other recommendations, is generally necessary to rebut a school district's assertion that a child is receiving a "free appropriate public education."

Id. (footnotes omitted).

223. *McLaughlin v. Boston Sch. Comm.*, 976 F. Supp. 53 (D. Mass. 1997).

nation. McLaughlin was forced to proceed himself when he could find no attorney to litigate on behalf of his daughter.²²⁴ And, like the attorneys in *Doe*, *Ford*, and *Amy M.*, McLaughlin obtained an excellent result for his “client.”²²⁵ In cases involving civil rights, like *McLaughlin* and the IDEA cases, there are often many more violations of children’s rights than there are attorneys willing or able to litigate to vindicate those rights.²²⁶

Economically and practically, given the litigation costs and the risk of losing the case, a parent-attorney may actually be discouraged from taking an active role in the education of her child, particularly if there is no compensation even with success. Such a result is clearly contrary to the concern expressed by Congress in discussing the adoption of the original fee-shifting provision: that disabled children should be given the right to a FAPE, and their parents should not be disadvantaged in ensuring that right.²²⁷

The policy of denying parent-attorneys their fees in successful litigation of IDEA claims is nonsensical because the IDEA and its fee-shifting provision were designed specifically to enhance the rights of disabled children and involve their parents in the administrative process. Yet, denying fees discourages those parent-attorneys from being involved in their child’s education and quite possibly could detrimentally affect the child’s access to a FAPE.

CONCLUSION: CONNECTING ALL THE PIECES

The parent-attorney who wishes to recover attorney’s fees in representation of her disabled child in an IDEA case has an arduous task ahead of her. Only one district court has held that fees are recoverable, while a host of courts at all levels have held that fees may not be awarded.²²⁸ What these parent-attorneys have on their

224. *Id.* at 65.

225. *Id.* (“But for his readiness to proceed personally, plaintiff’s complaint might never have been filed and her enrollment at BLS [Boston Latin School] never achieved.”).

226. *See id.*

227. *See* 131 CONG. REC. 31,376 (1985) (statement of Rep. Miller); *supra* note 199 and accompanying text.

228. *See* *Matthew V. v. DeKalb County Sch. Sys.*, 244 F. Supp. 2d 1331 (N.D. Ga. 2003) (the only case to hold that fees may be awarded). The courts that have denied fees range from federal appellate courts to state supreme courts. *See, e.g., Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601 (2d Cir. 2006); *Woodside v. Sch. Dist. of Phila. Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001); *Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998); *Rappaport v. Vance*, 812 F. Supp. 609 (D. Md. 1993); *Miller v. W. Lafayette Cmty. Sch. Corp.*, 665 N.E.2d 905 (Ind. 1996).

side is the simple fact that Congress clearly did not intend these parents to expend vast sums of money and huge amounts of time defending the rights of their disabled children without being compensated when they prevail.

The cases that denied fees were erroneously decided because they relied primarily on comparing the situation in the IDEA cases to *Kay*.²²⁹ There are significant differences between the factual situations and the applicable statutes in *Kay* and the IDEA cases. Specifically, parent-attorneys are not acting pro se when representing their children because they are litigating a claim based on a violation of their children's substantive rights, not any right they themselves possess. Further, concerns over excessively attached or emotional representation when parent-attorneys represent their children are adequately checked by professional rules of conduct. It is contrary to the purpose of the IDEA and basic notions of fairness to request that parent-attorneys, as part of the general parent population, take an active role in educating their disabled child and then require them to expend not only their own resources, but also their time—time that could be used earning money from other clients—representing their child.

Further, by examining the actual language of the statute, it becomes clear that the IDEA does not prohibit a fee award to parent-attorneys. As the legislative history demonstrates, the IDEA's fee-shifting provision is completely different from the original language of the HCPA. The 1997 amendments represent a break with the original language enacted in the HCPA. Congress was aware of the problem with this language, given that both *Miller* and *Rappaport* had interpreted the provision to deny a fee award.²³⁰ Congress could have clarified its intent and added language to prohibit awards to parent-attorneys, but it did not. This can only be seen as an intention to allow the possibility of recovery to remain open to parent-attorneys.

Perhaps the most important reason to allow parent-attorneys to recover fees is, in the words of Representative Miller, that "[p]arents' involvement in the education of their handicapped child is not only essential to the task, it is a right specifically included in

229. See, e.g., *Ford*, 461 F.3d at 1090-91; *S.N.*, 448 F.3d at 603-05; *Woodside*, 248 F.3d at 131; *Doe*, 165 F.3d at 261-63; *Rappaport*, 812 F. Supp. at 611-12; *Miller*, 665 N.E.2d at 906-07.

230. Both cases were decided prior to 1997. See *Rappaport*, 812 F. Supp. at 609; *Miller*, 665 N.E.2d at 905.

the law.”²³¹ The IDEA’s goals, disabled children, and their parents would all be better served by applying the same general requirements for recovery of attorneys’ fees to parent-attorneys as to non-parent attorneys who are representing a disabled child. A parent attorney should not be deprived of the statutory right to attorney’s fees simply because he is acting as both an attorney representing a client and a parent trying his best to help his child.

Justin D. Kumpulanian

231. 131 CONG. REC. 31,376 (statement of Rep. Miller).